H. B. Zachry Company *and* International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO. Cases 11-CA-9153, 11-CA-9172, 11-CA-9183, 11-CA-9271, 11-CA-9698, and 11-CA-9801

May 6, 1982

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS FANNING AND HUNTER

On August 14, 1981, Administrative Law Judge Harold Bernard, Jr., issued the attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, Respondent filed cross-exceptions and a supporting brief, and the Charging Party filed a brief in reply to Respondent's cross-exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, H. B. Zachry Company, Roxboro, North Carolina, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings. Since we have found no merit to Respondent's credibility exceptions, we find that it is unnecessary to consider the General Counsel's motion to strike assertions in Respondent's brief that the Administrative Law Judge's prior decisions establish that he was predisposed to credit the General Counsel's witnesses.

[2] In adopting the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(1) of the Act by creating the impression of surveillance and by, in fact, engaging in surveillance, we find it unnecessary to rely on incidents in which site guards interfered with employee union activity or the suspicious movement of a company truck occupied by unknown individuals.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT engage in surveillance of union activities or create the impression of engaging in surveillance of union activities of our employees.

WE WILL NOT threaten employees with discharge for engaging in union activities.

WE WILL NOT more strictly enforce work rules because employees engage in union activities.

WE WILL NOT inform employees that any employee was discharged for engaging in union activities, or was refused rehire for such reason.

WE WILL NOT inform employees that union supporters were being laid off before employees who did not support the Union.

WE WILL NOT discharge or refuse rehire to any employees because of their membership in or activities on behalf of the Union, or any other labor organization.

WE WILL NOT refuse to employ any prospective employee because such employee is related to employees who support or form a union.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL offer Barry Edwards, Frank Keatts, John Scott, James Fuller, Victor Welch, Lester Hodge, Barry Robertson, Garland Keatts, John Bauer, and Mark Keatts immediate and full reinstatement to their former jobs or, if those jobs no longer exist, substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and WE WILL pay them for any loss of pay they may have suffered by reason of our discrimination against them, together with interest thereon.

WE WILL offer James Keatts employment to the position, or its substantial equivalent, in which he would have been employed on May 5, 1980, without prejudice to any seniority or

other rights or privileges he would have acquired, and WE WILL make him whole for any loss of earnings he may have suffered by reason of our discrimination against him, together with interest thereon.

H. B. ZACHRY COMPANY

DECISION

STATEMENT OF THE CASE

HAROLD BERNARD, JR., Administrative Law Judge: These consolidated cases were heard before me in March, April, and June 1981 in Raleigh, North Carolina, pursuant to complaint allegations that Respondent violated Section 8(a)(1) and (3) of the Act by engaging in unlawful surveillance of employees' union activities, threatening employees with discharge for engaging in union activities, attributing loss of employment to employees' union activities, discriminatorily tightening work rules enforcement, frequently transferring and isolating union adherents to discourage their involvement in union activities, discriminatorily refusing to hire and rehire employees, and unlawfully discharging several employees, including Supervisor Chuck Pickral. Respondent admits the supervisory and agency status of eight supervisory and managerial representatives as alleged in the complaint, but denies any wrongdoing.

Upon the entire record, including briefs filed by the Charging Party and Respondent and my observation of the witnesses' demeanor, I make the following:

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Respondent is a corporation engaged in construction work and is the general contractor for plant construction at the Mayo Project near Roxboro, North Carolina, a several hundred million dollar power plant construction project being built for Carolina Power and Light Company (CP&L) on the latter's property. Respondent, in the past 12 months, has received products valued in excess of $50,000 at the above construction site directly from sources located outside North Carolina, and concedes Board jurisdiction. I find that Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Union is a labor organization within the meaning of Section 2(6) and (7) of the Act as shown both by the record in this case reflecting that its purpose and objectives are to represent employees in collective bargaining with employers over wages, hours, and other terms and conditions of employment (G.C. Exh. 3) and by judicial notice.

III. THE UNFAIR LABOR PRACTICES

Respondent's construction work as general contractor on the coal-fired electric power generating plant began in February 1979. At times relevant herein, April 1980 through January 1981, Respondent employed about 265 employees and foremen, including about 70 in the boilermaker department under Superintendent Shorty Hanks, who reported to Project Manager George Fenox. There was no personnel manager or personnel department at the site. Although Fewox testified that termination procedures were left to the "discretion" of the superintendents and foremen, the Company had issued and distributed to supervision policy guidelines setting forth a step-by-step procedure to be followed, including warnings when discipline, including discharge, was involved. Respondent's employees were unrepresented by a labor organization.

The Beginning of the Union Organizing Campaign

Following requests to him from employees at the site for representation, generated by concern over working conditions, including wages and safety matters, Local 30 Boilermakers President Barry Edwards secured employment with Zachry there and soon thereafter met with craft union members in his office in Greensboro, North Carolina, in April 1980, where a decision was made to attempt organizing employees at the Mayo worksite. Pursuant to that decision the Union's representative sent a telegram (G.C. Exh. 2) to Respondent's project manager, George Fewox, on April 23 in which he notified Respondent that John M. Scott, Frank Keatts, Mark Edward Keatts, Garland Keatts, Barry A. Robertson, Jimmie Fuller, Barry D. Edwards, employees of Zachry, "are organizing committeemen and will be exercising their rights under the National Labor Relations Act."

Respondent reacted to the telegram promptly and in decidedly unfavorable ways.

The ironworkers superintendent and an admitted supervisor and agent of Respondent, Ronnie Tietze, told Foreman Chuck Pickral, according to the latter's undenied and credited testimony, to post the telegram's contents, "and he was mad, and as I put it up . . . he said, 'they wouldn't be here long, and they would be gotten rid of, period.'" Tietze's flat assertion was to prove accurate. Foreman Jerry Gravitt, who supervised 24 employees, who was promoted to supervision by January 1980, whom I find to be a supervisor and an agent of Respondent, *inter alia*, due to an uncontested status as supervisor over 24 employees and an uncontradicted agreement with Respondent that if his position as such did not work out he could return to his "tools," and who was also present at a supervisors' meeting discussed below, testified that 2 days after the telegram arrived (April 25) he talked with General Foreman Kenneth Hale, an admitted supervisor and agent of Respondent. Hale posted the list of names on the bulletin board of the employee union organizers and told him, *inter alia*, "they were to be gotten off the project one way or the other."

In action which was admittedly unprecedented,[1] Respondent also assembled supervisors, and Project Man-

[1] During cross-examination, Project Manager Fewox admitted that Respondent has never posted lists of names of employees engaged in solicitation for the Red Cross, sick funds, and the like.

ager Fewox read the names of employee organizing committee members to supervisors and superintendents on May 1. Fewox also recalled that Company Vice President Hammond delivered a speech to the group which was "strongly anti-union Supervisor Gravitt recalls Fewox saying that there was union handbilling on the job and that an attempt was underway to organize the job, and that Fewox made it known he did not want the job or company organized. Gravitt also recalled that Fewox assured supervisors, while holding up the telegram, that if supervisors felt an employee was in the Union he could confirm the fact in an hour.

In the course of this meeting, Respondent's attorneys listed the lawful forms of action open to supervisors, as well as the "don'ts." Admittedly, supervisors were told to spend more time with their men so as, allegedly, to make it easier for employees, should they be so inclined, to raise questions and get answers about the union organizing campaign on related topics. However, Foreman Gravitt testified he heard Fewox, towards the close of the meeting, state that "we were to supervise or observe all people that we knew signed union cards, or that were sympathetic to the union; and that if at any time we overheard them talking union matters on company time, that we were to find a way to get rid of them and not to make it look union-related." Foreman Chuck Pickral recalled that at a "supervisors' meeting" a couple of weeks or a month after the telegram was received Fewox said that the company policy was "no-union," that a union was not wanted, and that if supervisors suspected a man was a union member they were to let him know as they could find out and the man would be "taken care of." While Respondent's witnesses at the meeting deny this version of Fewox's comments, and it is not usual for so openly announced a plan to rid company ranks of union adherents to be communicated in the presence of two attorneys without their comment, it is noteworthy that Gravitt did not attempt to stonewall in support of a one-sided version, but instead admitted under cross-examination that Respondent's speakers had indeed also advised against treating employees any differently and that supervisors had been advised not to engage in surveillance and that observing union activity at the project is something they should be "careful" about. But, according to Gravitt, the speakers at the close of the meeting "contradicted themselves" and advised supervisors to observe employees' union activities and seek nonunion-related reasons for getting rid of such individuals. Whether Gravitt's account is entirely reliable or accurate (or whether Pickral is referring to the same meeting), or whether he, Gravitt, construed Fewox's statements about getting closer to the men with snatches of off-the-cuff comments made as the meeting dispersed, is unnecessary to decide because, as shall be seen further below, whether or not the statements were made entirely or as clearly as Gravitt recalled at this meeting or elsewhere, this indeed is what did occur at the jobsite following the Union's telegram and the supervisory meeting on or about May 1; *viz*, a course of conduct by Respondent so consistent with such alleged statements as to lend strong support to Gravitt's account or to the conclusion reached herein that this was the course embarked on by Respondent.

Surveillance

It is manifest that by pin pointing the identity, or spotlighting if you will the names, of all employee organizers to the entire jobsite employment community, supervisors and all employees alike, through the highly publicized means of reading the names to the supervisory and managerial force, as well as by posting the names of such employees, Respondent was forcing the very attention on them as special individuals that it so strongly pretended it would not do in the very same posting and disclaimed having done so in this hearing. As shall be seen further below, Respondent's supervisors and authorities frequently referred to these individuals on "the list" during the course of carefully watching them in their work and while engaged in union activities.

The first day following Respondent's receipt of the telegram, Barry Edwards noticed Superintendent Shorty Hanks standing right behind him talking to someone. After the other person walked off, Hanks remained in the same place watching Edwards: "He just stood there and watched me weld, me and my partner weld." Edwards and his partner, John Scott, were both identified on the telegram as union organizing committee members, and Edwards undeniably had done excellent welding work; which fails to explain, as Respondent failed to explain, why Hanks watched the pair, Scott also being considered a good worker by Respondent's general foreman, Marvin Pack. Edwards testified that Hanks was right beside the two more often, every day or two—just standing and watching.

Edwards saw supervisors he had not seen in the area before, such as Project Manager Fewox 2 or 3 days after the telegram's arrival. Fewox stood on an elevation right above Edwards watching him for 10 or 15 minutes, 2 or 3 days a week. Shortly afterward, on a day prior to May 12, which Edwards placed as May 1, he talked to Supervisor Gravitt who confirmed his opinion in this regard. Gravitt told Edwards he was being watched after the two had been working together for a few days. Gravitt said that "we were being watched and he had heard that we were all going to be off of there before long," "all the people that was trying to organize, all of the people named on the telegram," referring to Shorty Hanks, superintendent, as the source for this statement. Gravitt admitted the foregoing surveillance by Respondent, and his attribution to impending termination for the signatures on the telegram I find to be a serious threat of discharge for employees who engaged in union activities and that, therefore, irrespective of whether there was a friendly relationship between the two, or even whether this was only Gravitt's "opinion" or an attribution that another higher official had expressed the threat, it constituted a violation of Section 8(a)(1). *Daniel Construction Company, a Division of Daniel International Corporation*, 241 NLRB 336, 338 (1979).

In mid-May Edwards and Mark Keatts, also named in the telegram, were handbilling at the brass shop employee entrance to the project. Edwards remembered, as admitted, that Fewox was watching the two while they handbilled, and also that Keatts had nervously taken note of Fewox's presence and his keeping them both under

scrutiny. About 6 minutes later Fewox was still there and Edwards decided to try to "get rid of him," but as he turned towards him he saw Fewox leave. Shortly on the heels of Fewox's departure a site guard, employed by CP&L, for the first time in the Union's campaign suddenly stepped toward Edwards and ordered him to stop handbilling. Keatts gave his pamphlets to Edwards, who told the guard he intended to exercise his rights. At the time, there were, in addition to Keatts and Edwards, 11 or 12 more employees watching the unfolding events. When Edwards replied, the guard said he would take them (the pamphlets) away from Edwards if he did not quit. The guard then grabbed for the pamphlets, wrestled with Edwards, backed him up, and took the pamphlets from him. The parties stipulated that this incident was described "for background only," without further elaboration or limitation, and Respondent urges that it had no authority over the CP&L guard and thus cannot be held, assumedly, responsible for his acts; yet, as cogently pointed out in the Charging Party's brief on a later occasion, Fewox instructed the guard to determine the appropriateness of an individual's presence on the site and the guard did so, which seems to indicate an element of control in Zachry's officials over the guard's conduct. Moreover, even though there was a subsequent apology and return of the pamphlets privately to Edwards, and a statement that the guard made a mistake, virtually the same thing occurred the very next day without apology or explanation and the union pamphlets were not returned. It must be obvious that, in the view of employees, the union activities of Keatts and Edwards were being kept under daily surveillance in an atmosphere charged with animosity towards the exercise of Section 7 rights to the extent even where violent force could be used to interfere with those rights. Such a "background" whether tied specifically to Respondent's responsibility or not is indeed important to evaluating its proven actions, such as Fewox's conduct on the day in question. After all, no explanation was offered for the closeness in time of the guard's action *vis-a-vis* Fewox's presence and his surveillance of the handbilling—nor is Fewox's subsequently demonstrated control or authority over the guard's activities denied by Respondent. I consider Fewox's explanation that he stood there watching the men to insure that they were employed on the site, and thus entitled to be there, unpersuasive since it contradicts Respondent's position that the guards, who had the responsibility for such screening, were under CP&L's direction and not Zachry's; and thus Fewox, at least on this record, was not required to take such task, i.e., seeing to it that the two were employees, on his already amply burdened shoulders as project manager. I further consider his explanations that he made daily tours of the jobsite, thus accounting for reports that he watched union employees, unpersuasive since no other employee reports, to such a degree and with such substantial time periods being involved, were submitted into the record. These were not chance or unexplained surveillances either.

Thus, Edwards also testified that he handbilled with Barry Robertson on different occasions in early May (the parties stipulated May 29 and 30) at the brass shack early in the morning before working hours, and noticed a company truck nearby, whose unidentified occupants watched the handbilling an entire morning remaining in one vantage point 5 or 10 minutes and then moving to another. Adding to Edwards' conviction that the truck was used for this purpose was his uncontradicted recollection that the same company truck used to be regularly parked elsewhere. Edwards' testimony was undenied.

Respondent's then foreman, Supervisor Chuck Pickral, testified that on many occasions he was instructed by Ironworker Superintendent Ronnie Tietze "to surveil" the employees' activities and report the results to Tietze, and I credit Pickral's account over the curt denials by Tietze. I also credit the testimony of employees Barry Robertson, Frank Keatts, Garland E. Keatts, and Mark Keats that various supervisors, including Fewox, General Foreman Marvin Pack, Rigging Foreman Billy Williamson, Superintendent Shorty Hanks, Foreman Dick Johnson, and Tommy Wolfe, closely watched them for substantial periods of time on the jobsite. All the aforementioned employees appeared on the telegram and engaged in handbilling or signing up employees on union authorization cards; and, as noted, Respondent's explanation for the surveillance, i.e., that it was in the ordinary course of business, is not substantiated by evidence either that it was ordinary or that it was in the course of business-related concerns.

Foreman Gravitt testified that in the course of a safety meeting Superintendent Hanks, after addressing the usual things, stated that they should "watch the Union hands, observe them at all times." He said Gravitt was not watching the union hands close enough. Gravitt recalled that in early May Fewox asked him how "these Union men were doing," motioning to where Barry Edwards worked, and that he was instructed to "watch them." Since Gravitt told Fewox it was not necessary to watch them closely as they knew what they were doing, whereupon Fewox curtly replied, "[G]ood day," and since this occurred prior to Hanks' admonition to Gravitt that he was not watching the union hands closely by enough, it is reasonable to infer that Hanks' instructions or admonition flowed from the top of Respondent's hierarchy at the site, Fewox, and constituted yet further support for the conclusion that by all the foregoing Respondent was designedly watching the "Union hands."

When General Foreman Ken Hale posted a list of the names contained in the telegram on a bulletin board shortly after the telegram's arrival, he pointed out Barry Edwards' name, pointed to the end of the steam drum, and, beckoning towards Edwards, told Gravitt, "[T]hat's Barry Edwards, watch him, you know what to do." Hale also mentioned Frank Keatts, another name on the list.

The foregoing establishes by a strong preponderance of the evidence that Respondent both created the impression that employees' union activities were being kept under surveillance and that Respondent in fact engaged in such unlawful surveillance on a broadly based scale in violation of Section 8(a)(1) of the Act. I so find. *Daniel Construction Company, supra.*

Respondent's Threats Directed Against Union Activities

The complaint alleges that Respondent unlawfully discouraged employees from engaging in union activities by informing employees (a) that a fellow employee had been discharged for engaging in union activities; (b) that a fellow employee was not rehired because of his union activity; (c) that union supporters were being laid off before nonunion supporters; (d) and by threatening an employee with discharge for engaging in protected concerted activities—the first three allegations referring to conduct by Foreman Charles Pickral, the final referring to General Foreman Marvin Pack.

Regarding allegations (a), (b), and (c), there is undenied and corroboratory testimony by employees Richard Mingia and John Bauer that Foreman Pickral had let it be known to employees via Mingia that Bauer, who had been laid off earlier on May 18, 1980, under circumstances described more fully below in an analysis of his discharge and Respondent's refusal to rehire him, was in fact discharged and was not rehired by Respondent because he had engaged in union activities. Pickral, an admitted supervisor and agent of Respondent, took the stand as a witness for the General Counsel and expressly admitted the above three complaint allegations, thereby further substantiating the credited testimony of Mingia and Bauer, as well as allegation (c). I find that such testimony, including Pickral's express admission, amply supports those allegations in the complaint and the conclusion that Respondent, through Supervisor Pickral, thereby coerced employees in the exercise of Section 7 rights to engage in union activities by ascribing Bauer's loss of employment and Respondent's refusal to rehire him, as well as early layoffs generally, to union activities by its employees in violation of Section 8(a)(1) of the Act. Allegation (d) is treated below in the analysis of the alleged discriminatory discharge of employee Barry Edwards.

Barry Edwards

Edwards began work at the site on March 28, 1980, as a journeyman boilermaker welder after successfully completing welding tests for heavy and light wall construction with results termed "one of the prettiest test he'd [the company official] ever seen of many he'd administered— and done expediently, faster than most." Respondent stipulated that Edwards was a competent welder, and Edwards testified that Welding Foreman Dick Johnson complimented him on his work and the pains he took with it, as well as the help Edwards extended to coworkers about 2 weeks after Edwards started on B-boiler. General Foreman Pack also complimented Edwards on his work, a week or two later telling Edwards he "showed a lot of craftsmanship." Edwards, moreover, was never reprimanded in the course of his employment by Respondent.

Edwards quite prominently engaged in activities supporting the Union's organizational efforts. As the leading organizer, Edwards answered employee questions, describing the benefits of representation, handbilled at the site, and solicited 250 to 300 employees for the purpose of signing union authorization cards. Given the openness of Edwards' activities at the site and Respondent's surveillance thereof including specifically Fewox's watching Edwards and Keatts during their handbilling on May 29 and 30, described above, there can be no question but that Respondent knew of Edwards' actual activities as well as his designation as a union organizing committee member identified as such in the telegram of April 23.

That Respondent's animosity towards the Union was expressed both in general terms—that is towards the idea generally during managerial meetings—and specifically is manifested by instructions conveyed to supervisors. Thus, as noted above union activists identified in the telegram were further spotlighted—even targeted. Thus, Foreman Gravitt testified that shortly after the telegram Fewox motioned to Edwards' work area wanting to know how those union men were doing, and asking if he had to watch them much, advising Gravitt he should watch them and if *they* were caught goofing off or standing around they would be gotten rid of. Even before Fewox's instructions, General Foreman Hale, after posting the list of union committee members, showed Gravitt Edwards' name on the list, pointed to him, and said, "[T]hat's Barry Edwards, watch him, you know what to do." Gravitt further credibly testified that "they were to be gotten off the project one way or the other." General Foreman Pack, after taking Hale's place, repeatedly urged Gravitt that he had better be watching the *union* guys that were standing around doing nothing.

Edwards was discharged on June 9, 1980, allegedly for refusing to weld out of a "skyclimber," and it is in the foregoing context that the discharge must be analyzed. The parties devoted a great deal of effort to supporting the opposite views on whether or not a skyclimber—a mechanical, moving steel-fabricated platform that rides the surface of a boiler wall—can be safely used to position welders to work *from* as opposed to being confined to *transporting* welders or other workmen to and from their work stations. They did this because Edwards based his refusal to work from the platformed device on the grounds that it was unsafe to do so. Based upon the testimony and exhibits, including the detailed manufacturer's manual and the OSHA inspection report (Resp. Exh. 17), I agree with Respondent that most certainly the skyclimber was designed for, and can be used to, weld from—assuming the specific safety requirements surrounding its installation, use, and access to it are followed.

For numerous reasons, however, this clearly supported conclusion does not resolve the question of whether Respondent discharged Edwards unlawfully. In the first place it is open to serious question whether the preconditions for safe operation of this skyclimber had been satisfied *prior* to Edwards' assignment. Thus, the manual (G.C. Exh. 5) instructions require that only employees trained in its use should use it, and Edwards' helper that day had no such training. Secondly, the not inconsiderable height, about 129 feet (Edwards thought it to be 200 feet), at which the climber was to be used supported Edwards' concerns. Thirdly, when Respondent's safety engineer inspected the skyclimber he found, in fact, that it lacked a hand crank used in manual operation and thus

was not properly equipped. Edwards also testified the access to the climber was unsafe—a floating, swinging scaffold was to be used. Since Edwards, moreover, was to use the sky climber for some 2 months, he understandably objected further on the grounds that there had been an earlier agreement, or specific understanding at least, that he was to perform this work from permanent scaffolding—and no explanation was made to him why a sudden switch in plans was made. I credit Edwards' testimony in support of such understanding. Finally, the abruptness and animosity in Respondent's action raises a strong inference unfavorable to Respondent. Thus, on the day in question, after Edwards declined to work from the climber, offering to do other work (and, in fact, doing other work voluntarily), he was told by Pack, "Hey, that's it, you are either going to do it or go." Since Respondent was, professedly at least, conscientiously concerned about safety on the jobsite, as shall be discussed further below, it is reasonable to suppose that it would ordinarily have reacted with more care, or patience, if not appreciative understanding, for Edwards' situation, rather than ignore his request for a different assignment, ignore the prior understanding that scaffolding be used rather than the climber, and, finally and most revealing of all, ignore the possibility that so valued an employee with an unblemished record could be used in another assignment, unless some other consideration compelled it to take the drastic, precipitous action it did, unyieldingly rejecting his request for other work and firing him that same day without recourse. Respondent has offered no evidence to rebut the strong preponderance of evidence offered by the General Counsel establishing that Respondent, based on the foregoing, kept Edwards under extra close scrutiny and discharged him because of his activities in support of the Union. *Mark J. Leach d/b/a Mark J. Leach Electrical Contractors*, 251 NLRB 1100 (1980). This and the following findings with respect to alleged violations of Section 8(a)(3) of the Act are guided by, and intended to be in harmony with the teachings of *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980); see also *Limestone Apparel Corp.*, 255 NLRB 722 (1981). It follows and is therefore found that, when Fewox inflexibly ordered Edwards to perform such task or be terminated, he made such ultimatum or threat because of Edwards' known union activities thereby further violating Section 8(a)(1) of the Act.

Frank Keatts

Keatts was hired in mid-March or April as a tube welder and worked under Foremen Dick Johnson until his discharge on May 6, the date of his termination being corrected at the hearing by an amendment to the complaint. One of several related Keattses on the site who were engaged in union activities, Frank Keatts was named in the telegram (G.C. Exh. 2) as a union organizing committee member, and both handbilled at the jobsite entrance several times, on which occasions he was openly assisted by all the other committee members, and solicited some 20 or 30 employees to sign union cards, speaking on behalf of union representation to about 100 or more employees. Keatts testified without denial that Fewox and other supervisors had seen him engaged in handbilling.

On the day of his discharge Keatts was told to "go down" for not wearing a hardhat while working. The record is clear, however, that fellow employee Jimmy Ramey had earlier been discovered by supervision working without a hardhat and that Respondent, without the presence of reported mitigating circumstances, had only issued Ramey a warning not to be caught without his hardhat on, rather than discharging him. In Keatts' case several factors strongly support the view that Respondent treated his case differently. Thus, Keatts, who denied walking around without a hat on, at least offered the explanation that he had been told by Respondent's safety officer that it was permissible to shed the hat when working in a "tight" or covered area, at which time he could wear the welder's safety shield alone; and the question of whether he was in such an area at the time involved was not an easily resolvable one at this hearing and presumably was not all that clear to either Keatts or his supervision on the occasion involved. This made it all the more reasonable to assume Respondent would have, as it did with Ramey, only issued a warning.

But Respondent alleges that the "man," caught without his hat, was seen quickly moving away when surprised, thereby conceding his "guilt," and therefore he was discharged properly. However, there was no indication that there was any uncertainty over Ramey's infraction of the safety rules, yet Respondent was lenient. Respondent attempts to justify the severity of discharging Keatts, even though its own foreman, Gravitt, knew of no instance in the past when an employee was discharged for not having a hardhat on, by pointing to a kind of heightened safety awareness due to the recent death of an employee who had fallen from a structure. It is revealing of Respondent's true concerns that it virtually ignored the safety concerns, proven reasonable, raised by Barry Edwards, brushing safety rules aside to fire him for refusing to work from the climber (discussed above) only to raise "safety concerns" when it suited its purpose to do so in discharging Keatts, without prior warning, without prior offenses by Keatts, and in the face of allowing another employee to escape with only a warning for the same offense, clearly disparate treatment and revealing, as well, the lack of any bona fide reason for discharging Keatts. *Lyman Steel Company*, 249 NLRB 296 (1980). I conclude that Respondent seized upon the entire incident as a pretext to discharge Keatts because he engaged in union activities, thereby violating Section 8(a)(3) and (1) of the Act.

It further stands to reason that, by discharging Keatts *ostensibly* for failing to wear his hardhat even though this would have been a *first* offense, Respondent, in the view of its employee community, was drastically tightening up the enforcement of work rules in response to the union activities of employees, thereby further violating Section 8(a)(1) of the Act. This is supported also by the circumstances surrounding the discharges of Scott and Fuller.

John Scott and James Fuller

Scott and Fuller worked together as experienced welding partners assisted by welder fitter Burch as part of the team, the latter's job, *inter alia*, being preheating the metal about to be welded by Scott and Fuller—an admittedly necessary step in the team's functioning. Foremen Dick Anderson, and Superintendent Hanks, had complimented Scott and Fuller for their "first quality work," while General Foreman Pack on several occasions had complimented Fuller individually.

Both Scott and Fuller—but not Burch—were known employee union organizing committee members and Fuller, in addition, actively spoke with 30 to 35 employees about the Union.

On April 23, the day the telegram arrived, both Scott and Fuller were unexpectedly given other welding tests and transferred to a work position located in front of Superintendent Hanks' office. No explanation for the transfer was given to either employee and after their second day at such new location the two were fired for quitting "early." Their assistant, fitter Burch, was not discharged although admittedly he also had stopped work early.

Scott testified without denial that, shortly after the telegram (G.C. Exh. 2) arrived announcing the start of union organizing efforts, Foreman Pack spoke to employees at a meeting and announced that there would be no early quitting and that, *if employees were discovered quitting early, they would have to stay until 4:30, the end of the shift, and put tools up on their own time.* Just how early employees had been quitting on the site is unclear because Respondent, in the best position to explain why it was necessary to tighten up the "putting away tools" rules, failed to explain why it did so just after the advent of organizational activities by employees. The record establishes, in fact, that there was no clearly communicated rule in this respect, even after Pack's announcement. Thus, Respondent admitted that in hot-weld situations where no welds could be heated and then performed in the time remaining on the shift, the welder just sits until the shift end. Pack testified that the fitter is allowed 10–15 minutes because he has more tools to put away, but that welders can put away their tools in 4 minutes, and another of Respondent's witnesses testified only 5 minutes is allowed but there is no evidence to discredit employee testimony that "custom" allowed 15 minutes for welders to put away their tools prior to quitting time. Clearly, and I so find, there was no hard and fast rule in this respect.

On the day of the alleged infraction Gravitt told Scott and Fuller that they had been watched and would be fired for quitting early because Shorty Hanks "had 10 men he wanted to get rid of." Pack approached the three employees, who explained they had not knocked off early because it was only 4:15, and Scott testified without credible denial that Pack told them not to worry—that they did a good job and he would take care of it. Scott also told Pack that the lunch whistle had been 15 minutes late and therefore the employees had incurred a late (or shortened) lunch period of 15 minutes.

Superintendent Hanks sent Foreman Hale to investigate. I credit Scott and Fuller that Hale would not listen to their explanation absent Hale's denial of their testimony. Hale reported that the men had no explanation, when, in fact, they tried to explain the lunchtime loss and the fact that Burch had quit work, thereby leaving them no further duties since the continuation in welding required the fitter to prepare the metal by testing for metal warmth.

Unaccountably, Respondent waited until the following day to confirm Hale's report that there remained eight passes that were ready for welding, rather than checking on this that same day—a fact which tends to belie the importance to Respondent of the employees' quitting early. In any event, Respondent made no effort to explain, or contradict, the assertion of Scott and Fuller that Burch's cessation of work prevented them from working further, and their explanation therefore stands undenied.

On the date of their discharge, Welder Foreman Dick Anderson told Scott he was sorry he had been fired but "there was nothing he could do about it." Neither Scott nor Fuller had been warned or reprimanded for quitting early, and, as noted, employees had only recently been told that the result of quitting early would be loss of putting away tool time—not discharge.

I find the above to be further evidence that Respondent tightened up its early quitting rules because employees engaged in activities seeking union representation, the only reason appearing in this record for such action, which violates Section 8(a)(1) of the Act. I also find that Respondent unlawfully discharged Scott and Fuller given the latter's known union activity; Respondent's animosity well documented above; its efforts to shore up a rationale for their termination by retroactively referring to low productivity; the refusal of Hale to listen to any explanation; the reassurances of Pack that "it" was no problem; the absence of any clear cut rule or warnings to the work force generally, or Scott and Fuller in particular; the absence of any reason why their uncontradicted explanation regarding Burch's cessation of work did not excuse or reasonably explain their conduct, thereby normally inviting a lesser discipline than discharge; the unsatisfactory reason for disparity in treatment between the two and Burch; and the fact that in an employee force of about 265 employees there had been only one other reported discharge, elicited from Hale under leading questioning, of an employee for quitting early, besides the termination of union supporters Scott and Fuller since the project started, further evidencing the lack of any strong rule or policy until Respondent chose to stiffen its posture in this regard due to employees' organizational activities by, I find, discriminatorily firing Scott and Fuller in violation of Section 8(a)(3) and (1) of the Act.

Victor Welch

Welch was hired as a boilermaker rigger sometime in the period between December 1979 and January 1980 and worked under Foreman Lynn Simpson. Although not named in the April 23 telegram as a member on the union organizing committee, Welch was openly active on behalf of the union organizational efforts, talking to over 100 employees about union benefits for a 2-month

period in January and February and soliciting 100 to 120 employees to sign union authorization cards.

Foreman Gravitt testified that Welch worked under him for a period of time and that he, Welch, did good work; in fact, Gravitt notified Welch's foreman, Simpson, that Welch did good work at a time prior to April 23 and the Company's receipt of General Counsel's Exhibit 2.

Welch was fired on May 16, 1980, for alleged "unsatisfactory" work, although his termination slip also rated his work as good. (G.C. Exh. 8.) When he told Hale that the real reason was his union activities, Hale told him, "You know why, get your shit and let's go." Welch testified he had never been warned about poor performance or that his work was not good, and his testimony stands unrebutted. Moreover, Hale, who testified only after strongly leading questions that he had *instructed* that Welch be warned, could not say whether the instructions were carried out. Welch's supervisor did not testify.

Hale testified that Welch was fired because his work had been "highly unsatisfactory to me for a good while," and that he had even received complaints from other employees that Welch did not do his share of the work. This assertion cannot readily be accepted because it cannot be squared with the fact that Hale never told Welch about this—a course of conduct which normally would have ensued had it been true. There was no evidence of a rigidly administered chain of command which would have prohibited Hale himself from directly communicating this to Welch; or at least Hale, reasonably viewing the situation, would have asked Simpson whether he followed up on his alleged requests to Simpson to "warn" Welch and been able to testify about Simpson's responses at this hearing. Since this did not occur, and given the exaggerated appraisal by Hale that Welch's work was "highly unsatisfactory to *me* for a good while," Hale's account cannot be credited. (Emphasis supplied.) In the first place Hale, under cross-examination, admitted he rated Welch's work as good. Even assuming, *arguendo*, that Hale did feel critical about Welch's work performance for a "good while," no persuasive reason appears why he would in effect tolerate or even condone such conduct only to suddenly fire Welch at the early stage of the union organizational drive. I find no persuasiveness in his testimony that he viewed an impending reduction in force as a good time to take the action—given his distinction of the length of time Welch allegedly had already performed so poorly. Moreover, Hale admittedly failed to follow company procedures by not warning Welch or by first suspending him. Given the timing of Respondent's discharge of Welch, the absence of any warnings to Welch, Hale's abrupt angry dismissal without denying Welch's accusation that the reason was his union activities—in fact telling Welch *he* knew the reason—combined with Respondent's by then established animosity towards employees' union activities and knowledge concerning Welch's activities, as well as the noted considerations above, I find Respondent fired Welch due to his open support for the Union, thereby violating Section 8(a)(3) and (1) of the Act. *Peavey Company*, 249 NLRB 853 (1980).

Lester Hodge

Hodge was employed as a boiler rigger beginning on December 20, 1979, and worked under Supervisor Lynn Simpson until discharged on May 16, 1980, reportedly for an unsatisfactory amount of work production; *viz*, the failure to "hang" a sufficient number of rods.

Hodge signed a union card and conversed with about 20–30 employees at the site about the Union. During a conversation with employee Wayne Culpepper, Hodge disclosed that he had signed a union card, the talk occurring about 2 weeks prior to his discharge. Hodge testified without contradiction that Culpepper replied that he was against the Union, that he would not have anything to do with it, and that he believed anyone who signed a union card would be run off the jobsite.

In either the same conversation or a separate one but about the same time, employee Welch, who testified without denial that he had been asked earlier by Foreman Hale to look after his "friend," employee Wayne Culpepper, who had recently moved into or was living in Hale's residence (the move occurring prior to Culpepper's talk to Hodge), also testified that he, Welch, had a conversation with Culpepper while eating dinner at the site. Welch recalled that Culpepper said, "[I]f you get caught handbilling, signing union cards, or talking for the Union, they were . . . going to run your ass."

The day after Hodge's talk with Culpepper wherein Hodge informed the latter he had signed a union card, Hodge was transferred from hanging walls—an operation involving four or five employees—to hanging rods with one other employee—Culpepper. Admittedly, Hodge reported to supervision that the work was undermanned, that more than two men were needed to do the work required, but Hale only replied that the two were journeymen capable of doing it, and that they would get no helpers.

Hale discharged Hodge on May 16 for an insufficient amount of work hanging rods being accomplished by the two-man team of Hodge and Culpepper assigned to do the work. He testified that Pack told him the "boys" were not hanging enough tubes, and Respondent's brief adverts to both men not doing their work because they loafed, not because they needed helpers. Hale, however, testified he only fired Hodge and not Culpepper "as the former had been with me longer than Culpepper had," and Respondent further attempts to defend this painfully evident outright disparity in treatment on the further supercilious distinction that Hale also believed Hodge had adversely influenced his friend and house lodger, the 30-year-old Culpepper. On what grounds such conclusion is supposed to be based the court was not informed; hence there is a total lack of persuasiveness behind the advanced reasons for flagrant discrimination in the discharge only of Hodge for the same offense admittedly committed by Culpepper, who was not discharged, suspended, or even given a written warning.

Furthermore, Hodge had not earlier been given a written reprimand or warning, or a suspension either before the discharge or even in lieu thereof, indicating animosity towards him not reasonably ascribable to merely low productivity at the first task where it appears Respond-

ent claims he merited discipline. I do not credit Hale's testimony that he "reprimanded Culpepper and Hodge prior to the discharge and they simply stood there grinning." This testimony is inherently implausible given Hale's demeanor and the account is uncorroborated.

The advancement of shifting reasons for the discrimination between Hodge and Culpepper—given the prounion sentiments of the former and the antiunion position so strongly espoused by the latter strongly infers that Respondent's asserted reasons for said disparity—also on their face clumsily unpersuasive—were not the true reasons for Respondent's action, as does the severity in said action amounting to, in industrial relations, capital punishment without warning. *Louisiana Council No. 17, AFSCME, AFL-CIO*, 250 NLRB 880 (1980). Whether or not there is considered sufficient evidence to ascribe Respondent's knowledge of Hodge's support for the Union directly to Hodge's disclosure to Culpepper, a friend to Hale and lodger in Hale's house, and thus under reasonable surmise the communication link to such knowledge, or to Respondent's extensive network of regular surveillance established by the record and detailed above, it is clear that Respondent's demonstrated animosity towards the Union, unpersuasive reasons for discharging Hodge, shifting reasons for the disparity in discipline administered to two members of the same team, lack of warning, and the timing near the start in the Union's organizational drive supply a clear preponderance of evidence, and I so find, for the conclusion that Respondent discharged Hodge because of his prounion sentiments in violation of Section 8(a)(3) and (1) of the Act. *Lyman Steel Company, supra.*

Barry Robertson

Barry Robertson, the sixth employee in a row active on behalf of the Union to be fired shortly after Repondent received the Union's telegram, worked as a structural welder beginning in late March or early April 1980 and was fired assertedly due to a reduction of force on May 16, 1980, a peculiar occurrence given the early stages in construction work at the site made even more dubious by Respondent's failure to logically describe why the reduction was necessary, why Robertson was chosen, or not recalled thereafter since he had a year or more work left to do, and why other structural welders were seen being employed by Barry Edwards after Robertson's dismissal.

Robertson, as an employee union organizing committeeman named in General Counsel's Exhibit 2, was publicized by Respondent to be an active union supporter, and, in fact, handed out union cards to about 100 employees openly at the brass shack or main site entrance, as well as engaged in handbilling on different occasions. Robertson testified he saw Fewox watching him on such occasions and that Pack and Williamson, rigging foreman, also spent more time keeping Robertson under scrutiny than before the telegram arrived. Robertson spoke to employees describing how union representation could mean higher pay, other benefits, and improved conditions.

Respondent asserted that the reduction in force was occasioned by a "cash flow problem" which it chose not to describe, even generally, at the hearing. As to this reduction, which resulted in the layoff of four to six employees, four of whom were union supporters—including a supervisor, Gravitt, who declined Respondent's orders to watch the union hands constantly and who was told by a *smiling* Supervisor Pack that he too was included in the reduction—Fewox had allegedly told Hanks to "lay off six employees." Why these employees, or Robertson, were chosen was not explained persuasively by Respondent's reference to "the last hired is the first to go." There was no proof Respondent followed such a practice and some indication in the Hodge discharge that time on the job was not observed as a general rule. No proof was submitted as to the date of hire of other employees.

Moreover, curiously it is admitted that tube welders were hired at a higher rate, 35 cents per hour higher than the displaced structural steel welders, to replace the latter, which invites incredulousness since on its face this would not appear to solve the "cash flow" problem allegedly the cause of the reduction. Moreover, while Supervisor Johnson denied hiring any structural welders for 2 months after the reduction, Edwards testified credibly that he saw one or two such welders hired after Robertson's layoff, a fact which could have been addressed with definite contradiction had Respondent chosen to produce payroll records.

Robertson's layoff—actually a discharge for all that appears in the record—occurred suddenly, without explanation being accorded Robertson, who had a year or more left just on the assignment he was there doing, and early after the start of the union campaigning, with unpersuasive reasons surrounding his selection and the reduction itself. Given the ample evidence establishing Robertson's union activities, Respondent's knowledge thereof, and its deeply rooted antagonism towards union organization, I consider the unpersuasive—even contradicting—reasons for the layoff and Robertson's selection provide abundant support for the conclusion that Respondent discharged him because of union activities, thereby further violating Section 8(a)(3) and (1) of the Act. *Louisiana Council No. 17, AFSCME, AFL-CIO, supra.*

Garland E. Keatts

Garland E. Keatts was hired on April 1, 1980, as a structural welder and fired on May 28, 1980 by Supervisor Tommy Wolfe, who simply told him "unsatisfactory weld" and directed him to get his "stuff" and meet him at the office for dismissal processing.

Garland Keatts, another employee named on General Counsel's Exhibit 2 to receive Respondent's swift retribution, solicited 30 to 40 employees to sign union cards at the brass shack. Keatts testified that he had never been reprimanded for unsatisfactory work, and I credit his account over Wolfe's testimony that he had to "get on Keatts several times—he was making mistakes" because Wolfe supplied no examples, issued no warnings, and did not characterize the mistakes as to seriousness—in fact Wolfe testified that Keatts' welding work was basically *satisfactory*. Further, Wolfe testified that Keatts had been making unsatisfactory welds for 6 or 7 days prior to the

date Wolfe discharged him and attempted to explain the discrepancy in his story arising from the fact that he had not detected such poor welds (and thus corrected Keatts) by explaining that while making his rounds *he had no occasion to inspect Keatts' work*. The fact that Wolfe makes rounds assumedly to inspect the work done by his welders causes one to question why Wolfe did not inspect Keatts' work; more significantly it gives plausibility to Keatts' account that he had welded the same way all week without—as known to him—any dissatisfaction by supervision. This made it all the more reasonable to assume that, unless Respondent had other more pressing considerations, Wolfe would have taken Keatts aside, showed him the error of his ways, and told him to return to work with improved or better informed techniques. This was a course even more reasonably commended under normal circumstances than firing him because Wolfe had been constantly telling Respondent's superintendent that he needed structural welders and even Wolfe conceded he considered Keatts basically satisfactory. The final factor supporting the conclusion that some other consideration than that which ordinarily would be controlling, i.e., Respondent's need for structural welders, was operating on Respondent's decision-making is the fact that Wolfe did not even show Keatts the poor welds he had performed though Respondent provided color photographs showing the welds in great detail at this hearing. I find the General Counsel has proven by a preponderance of the evidence, including the timing of Keatts' discharge, the unpersuasive rationale behind the action given the far more reasonable courses open to Respondent, its indifference to Keatts' deserved need for an explanation or demonstration of his poor welds, its apparent ignoring of Keatts' use, after corrective action, in meeting its own undenied needs for structural welders, and its demonstrated animus towards Keatts' union activity, that Respondent discharged Keatts because of his union activity in violation of Section 8(a)(3) and (1) of the Act.

John Bauer

John Bauer, a rigger helper hired on January 25, 1980, worked under Billy Williamson, rigger foreman, until laid off on May 18, 1980, in the same reduction in force that claimed Barry Robertson, discussed above, and which was found unsatisfactorily explained. Bauer was complimented for his work on the job and received a raise just prior to the "lay-off."

Barry Robertson approached Bauer at work asking him to join the Union early in May, around 2 weeks or so before Bauer's layoff. Bauer accepted a card from Robertson, and, in Williamson's presence, filled the card in using a co-employee's back as support or writing surface. Bauer, while filling in the card, asked Williamson how to spell Respondent's name, filled out the card, and signed it. While Williamson denied seeing the foregoing, there was a rehearsed curtness in his denials which left me unpersuaded that his account was accurate; moreover, there is ample further evidence that Respondent knew of Bauer's actions on the occasion noted.

On the day he was laid off Bauer's immediate supervisor, Williamson, professed shock, telling Bauer "it was sad that some of the good help was going, and some of the people he would have gone were staying." A carpool companion, Foreman Dick Johnson, expressed surprise that Bauer was laid off since he was a good worker and Johnson did not see any reason for the action, which "didn't make any sense." En route to home the car stopped at a store for check cashing, and passenger and fellow employee Richard Mingia, who had volunteered to help Bauer by recommending him for ironworker employment at the site, saw Ironworker Foreman Chuck Pickral inside. Mingia explained Bauer's situation, told Pickral Bauer was a good hand and the carpool group volunteered to see to it that Bauer had all the ironworker tools necessary. Pickral told Bauer "to show up Monday and we'll hire you on." The record testimony clearly establishes that this was tantamount to Bauer's being rehired, *viz*, that such a commitment by an ironworker foreman is generally honored; the only specific instance Iron Superintendent Ronald Tietze could recall when he did not honor a "referral" by Pickral was "I didn't hire one—a good looking woman."

Tietze admitted that Pickral told him about Bauer's coming to work on May 19 telling him Bauer would "be a good hand."

Bauer met Tietze at the gate on May 19, the latter telling Bauer he would "check at the office." For Bauer what ensued was seemingly callous treatment while he waited at the gate for 7-1/2 hours without further word from Tietze, who for the entire day did not return to the waiting Bauer or send word. Anxious for some information concerning his status, Bauer asked for Tietze's whereabouts at the entrance gate but was told only that "the guy couldn't get him."

Later, Bauer's carpool companion, Mingia, told Bauer that he had asked Pickral why Bauer was not hired, and that Pickral had told Mingia that it was because Bauer was one of the people who had signed a union card. A month later Bauer confronted Pickral with Mingia's account, and the latter responded, "What did I [you] expect, you signed the card and it is par for the course."

Mingia testified that in conversations with Pickral the latter said Tietze could not hire Bauer because Bauer had signed a union card—that he hated it had to be done that way since Bauer's abilities were such that he would like to have hired him. On a weekend after the above incident Pickral further told Mingia he could not hire Bauer because company policy was that anyone who signed a union card was considered a troublemaker and could not be hired. Mingia, in testimony similar to that of Pickral, testified he heard a talk between Tietze and Pickral concerning Bauer wherein Tietze said he could not hire Bauer. When Pickral asked why, Tietze replied "because he is on the list, you know of union hands that signed the Union card." Tietze denied telling Pickral he would not hire Bauer because he was on a list but "could not recall" a discussion with Pickral at which Mingia was present regarding Bauer's application for employment. Absent a denial of Mingia's account, it is credited.

Tietze testified he decided not to hire Bauer "because he had worked there before," stating that he "figure[d] if he [Bauer] can't work for a superintendent on that job he

can't work for me" and that he did not even know if he looked at Bauer's application. Respondent further contended that any "list" referred to in testimony referred in actuality to a list of laid-off employees, not union supporters. These further instances of Respondent's efforts to shore up its defenses are as transparent as their forerunners. In the first place, Tietze offered no reason why he left an employee recently separated only because of an alleged reduction in force waiting for 7-1/2 hours without according him the ordinary consideration called for, which suggests some antagonism based upon Bauer's support for the Union; secondly, Bauer had not been "unable to work" for his superintendent—he was allegedly laid off in an economically caused reduction in force—and, hence, Tietze's statement of his own policy, it is dramatically clear, did not even apply to Bauer; thirdly, although Tietze testified as an additional reason for not hiring Bauer that he had never been an ironworker before, he admitted that he did not ask Bauer about his past construction industry experience; in fact, and fourthly, Tietze, despite recommendations, usually honored, by supervision to hire Bauer, did not recall if he looked at Bauer's employment application. (Resp. Exh. 19; rejected exhibit file.)

Superintendent Hanks, strongly led nearly continuously by Respondent's counsel despite frequent cautionary rulings, testified in answer to the question "was any employee kept on with less seniority than Bauer" merely "not to my knowledge." It is not surprising that some 2 or 3 months following Bauer's layoff and Respondent's refusal to rehire him Project Manager Fewox informed Foreman Pickral, as testified credibly by the latter, that Respondent had to rehire Bauer because "he has too good of a case."[2]

I find that the General Counsel has proven by a clear preponderance of the evidence, including Bauer's known support for the Union, Respondent's unyielding animosity thereto, the admission of its own agents, and Respondent's fabrication of transparently false explanations, that Respondent both discharged Bauer and refused to rehire him because of Bauer's support for the Union, thereby violating Section 8(a)(3) and (1) of the Act.

Mark Keatts

Mark Keatts was employed as a structural welder from April 1979 until his discharge by Supervisor Marsha Altvater for excessive absenteeism on January 27, 1981. Keatts, during this period, actively and openly supported the Union's organizational drive, handing out pamphlets, securing signed union authorization cards, and talking to about 200 to 300 employees in support of union representation. Keatts was handbilling with Edwards on the occasion when the latter was assaulted by a site guard, described above.

At the time of his discharge Keatts was the last remaining union adherent named in the telegram (G.C. Exh. 2) employed on the site—since the discharge of Barry Edwards on the previous June 9, but Keatts had engaged in handbilling later in November keeping alive the organizational drive substantially diminished by the discriminatory discharges noted above.

There are some indications that Keatts was the cause of his own separation; thus, he had been warned against absenteeism and two other employees were discharged for such reason. However, there are some other factors which arouse more than reasonable suspicion that Respondent was motivated in discharging Keatts by unlawful considerations. Thus, Keatts was told prior to his discharge by Foreman Wolfe and Supervisor Altvater that he was a good worker; in fact, Wolfe told him in June that he was the "best welder he had" and Altvater told Keatts "that it was going to take a hell of a man to replace me because I gave her good quality work and I didn't fool around." This testimony was augmented by Keatts' further undenied recollection that a supervisor on several occasions in June 1980 had told him he put out "good quality work." It is reasonable to conclude that under ordinary circumstances a good worker will not be discharged unless sufficient grounds are clearly present for the action—in this case, allegedly, absenteeism was the cause for Keatts' termination. The problem I find with Respondent's position rests in its own admitted absenteeism policy and its failure at this hearing to reasonably show conformity with said policy in Keatts' case. Keatts testified without denial that he had in fact called in or presented reasons satisfactory to Altvater for his absences, some of which were due to injuries or an assault or burning eyes due to welding, leading Alvater to conclude that on those occasions the absences would be considered excused. If an "excused" absence under Respondent's admitted policy means anything at all it means the absence was "excused," and, in ordinary parlance, would not thereafter stand as a critical mark against an employee. At the hearing, however, after attention had been addressed by the examination of the witnesses to the question of excused absences, Respondent's counsel, via leading questions it is relevant to note, elicited from Altvater that the termination action against Keatts flowed from his absentee record *overall*, including excused and unexcused absences.

Thus emerged the spectre of Respondent's dredging up all of Keatts' past absences, some 10 from August 1980 until January 1981, and a demonstration in time reversal converting excused absences into their very opposite to Keatts' disadvantage—a kind of *ex post facto* penalty for prior conduct which was not, when engaged in, to be held against him.

Altvater, although informed sufficiently in advance of the hearing that the entire matter concerning Keatts' discharge would be under examination, including her testimony as to events, could not recall which, or how many, of the absences listed specifically on Keatts' termination slip (Resp. Exh. 22) were excused. Furthermore, Altvater did not produce her written records reflecting the specific circumstances. It follows that the *bona fides* for Respondent's termination is left very much in the dark in a case where the strongly established evidence indicates a course of conduct on Respondent's behalf to rid the site of union adherents, Keatts being the sole remaining

[2] It appears Bauer was "rehired" in September 1980, but there is no basis in such reported occurrence for altering the usual full remedy pertaining to discriminatory discharges and refusals to rehire.

union organizing committee member. I find that the General Counsel, by showing Keatts' highly active and open activities in support of employee organizational efforts, Respondent's knowledge thereof, its pronounced animosity towards such activities, and Respondent's unsatisfactorily demonstrated reasons for its strong action—discharge against a good worker, rather than a lesser suspension, for example—has established by a preponderance of the evidence that Keatts was discharged for his union activities in violation of Section 8(a)(3) of the Act.

James Keatts

James Keatts applied for employment on April 27, 1980, 4 days after the telegram (G.C. Exh. 2) naming Keatts' relatives as members of the union organizing committee was received by Respondent. He noted on the application that he had relatives on the site by checking a "yes" box. His brother, Frank Keatts, was to be discharged on May 6, and his relatives—two other Keattses and Barry Robertson—were also to be fired unlawfully later that month and in January 1981 because of their union activities.

Keatts was interviewed, hired, and told to report for work the following Monday, May 5, as a plumber's helper by Piping Superintendent Richard Bentley, who admittedly did the hiring. Keatts, pursuant to said discussion with Bentley, who had informed him what the pay was, and told him what tools were required, attempted to report as directed on Monday to Bentley, who was unaccountably not available. Keatts tried (as did discriminatee Bauer) to locate Respondent's hiring official—in this instance Bentley—without success, also waiting hours (as did Bauer) without any word until 11 a.m. when Superintendant Hanks appeared. Hanks, as demonstrated above, discharged Frank Keatts unlawfully on May 6.

Hanks told James Keatts that he was not needed because the plumbers had not come in yet. For his part, Bentley admitted hiring Keatts, but testified he did not need Keatts the following Monday because the plumber Bentley had hired to do some plumbing work—sink attachments, pipe connections, and the like—had reported that he could not get a ride to the site. This was pointed out as a strange development insofar as Keatts' employment was concerned; that is, by the cross-examination of Bentley. Bentley testified he had interviewed 18 plumbers for the work in question. Their applications were on file. Yet Bentley gave no good reason why he did not call a single one of them to substitute for the absent plumber. The only reason he did provide was most unpersuasive. He claimed the 17 other plumbers were not considered qualified to perform the work in question yet was unable to provide any basis for such conclusion, and at least a part of this very same work was later performed by a pipefitter. Bentley testified further that he "never found a plumber" for the work although not advertising for one and could not even recall if he called the union hall for a referral. Admittedly, the work Keatts was hired to perform was later done by another helper on the site. Furthermore, although James Keatts had continued to make known his interest in employment at the site by reapplying in early May, he was never contacted by Respondent pursuant to Hanks' assurances that, when refused employment on May 5 it was, for all that appeared, only because he "wasn't needed yet" and even despite Bentley's promise to call him when they (the plumbers) came in.

What emerges in the case of James Keatts is a well-known relationship as brother to Frank Keatts, one of the most prominent union supporters on the site, and as a relative of two other Keattses who were also singled out for discriminatory discharge, and Barry Robertson, another unlawfully discharged employee who was also a committee member. Respondent rid itself of all the named union organizing committee members in what is herein found to be unlawful conduct, and James Keatts was related closely to these or other discriminatees at the site.

Against this background the question must be asked why Respondent found it necessary to render so implausible an explanation for its refusal to employ James Keatts on and after May 5 after directing him to report for work following his interview on April 27, unless it was to cloak the real reason, as suggested by the Charging Party's brief, which was that it had, between April 27 and May 5, become aware he was "one of the Keatts' boys," which promised the possibility, strongly opposed by Respondent, that another union-favoring employee would join the work force at the site. The fact that Respondent failed to provide a reasonably plausible account for refusing to employ James Keatts on May 5 or thereafter leaves remaining only one reason appearing in the record for its action, the latter's relationship to employees known to Hanks to be highly active in union organizing efforts and who themselves were targets of Respondent's retaliation, including his brother, Frank Keatts. Accordingly, it is concluded that by refusing to employ James Keatts Respondent further violated Section 8(a)(3) of the Act. *Albertson Manufacturing Company*, 236 NLRB 663, 673, 674 (1978); *Maine Apple Growers, Inc.*, 254 NLRB 501 (1981); and *Copes-Vulcan, Inc.*, 237 NLRB 1253 (1978).

The Discharge of Supervisor Chuck Pickral

The complaint in Case 11-CA-9801 alleges that Pickral, foreman over 51 employees, was discharged for refusing to sign an untrue statement during the course of Respondent's efforts to prepare its defense in the earlier series of cases. This allegation, if true, would constitute unlawful conduct under the Act because it is tantamount to an employer's firing a supervisor for refusing to engage in conduct aimed at interfering with the exercise of employees' Section 7 rights—in this instance their efforts to seek vindication of such rights through Board processes. Therefore, Respondent's motion to dismiss the complaint for failure to state a claim upon which a violation can be based or relief can be granted is denied.

The record shows that Pickral was sympathetic towards employees' efforts seeking union representation. There is undenied testimony that Pickral solicited employees to sign authorization cards in early October 1980, and that Respondent learned about this from Foreman Randy Yarborough and employees Glen Yarboro

and Billy Morgan. Pickral himself also admitted having authorization cards in his possession and offering the cards to employees to sign.

Respondent discharged Pickral on October 31, 1980, citing as a reason for its action Pickral's refusal to follow policy and instructions—not taking a direct order, *viz*, allegedly failing to stay neutral in the campaign.

The General Counsel bases the contention that Pickral was fired for refusing to sign a false statement largely on the timing of Respondent's actions. He argues taht if Respondent, in actuality, was concerned about Pickral's organizational activities it would have dismissed him promptly on receipt of such information a week or so beforehand, in mid-October, rather than first interviewing Pickral concerning the allegations in the complaint—wherein Pickral was named as one of the supervisors who engaged in a substantial amount of conduct in violation of the Act—and then firing him only days later on October 31 after Pickral had refused to sign the alleged false statement.

However, it is equally reasonable, if not even more so, to infer that Respondent was concerned about two things: the alleged complaints from employees concerning Pickeral's union activities (including Respondent's vulnerability to responsibilities therefor under Sec. 8(a)(2) of the Act) and its accessibility to the voluntary cooperation of a crucial witness for its defense in the complaint cases, an accessibility which would be compromised or rendered difficult at best if Respondent were to confront Pickral with the allegation concerning his prounion activities and "complaints" against his conduct in this connection. This could reasonably explain the timing for Respondent's actions towards Pickral and therefore render that factor no basis, standing alone, for a finding that Respondent acted against Pickral for refusing to sign the tendered statement.[3]

The record also shows that during his interview with company counsel Pickral admittedly responded that counsel's tendered versions of the possible circumstances surrounding the complaint allegations, *viz*, that Pickral, contrary to those allegations, had not engaged in such conduct, and that perhaps the persons he spoke to had misunderstood him, were correct. In fact, during cross-examination Pickral admitted he had also told company counsel that each page was accurate, refusing only at the end of the interview to sign the statement.

There are other considerations germane to this inquiry as well. Respondent has demonstrated a proclivity towards discharging union adherents because of their organizational activities, but as pervasive as such conduct may be it has not been demonstrated that Respondent would venture into the dark and dangerous waters of attempted subordination of perjury—like conduct as alleged in the complaint. Rather, while no express finding in this connection is made, it is far more consistent with Respondent's *modus operandi* that it discharged Pickral because he engaged in activities in support of the Union, clearly an anathema to Respondent. In fact, Pickral himself testified that Ironworker Superintendent Ronnie Tietze told him he was "fired for being a union organizer." In view of the foregoing, I find there is no preponderance in the evidence adduced at the hearing that Respondent discharged Pickral for refusing to sign an untrue statement.[4]

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with the operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

CONCLUSIONS OF LAW

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By engaging in the conduct described in section III, above, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.
4. By discharging Barry Edwards, Frank Keatts, John Scott, James Fuller, Victor Welch, Lester Hodge, Barry Robertson, Garland Keatts, John Bauer (and refusing to reemploy the latter), and Mark Keatts; and further by refusing to employ James Keatts, Respondent violated Section 8(a)(3) and (1) of the Act.
5. Except as is set forth above, Respondent has not otherwise violated the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

It having been found that Respondent discriminatorily discharged Barry Edwards, Frank Keatts, John Scott, James Fuller, Victor Welch, Lester Hodge, Barry Robertson, Garland Keatts, John Bauer, and Mark Keatts, and further that Respondent discriminatorily refused to remploy James Keatts, I shall recommend that Respondent offer the former immediate and full reinstatement to their former jobs or, if such jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they normally would have earned as wages from the date of their termination to the date of an offer of reinstatement. Backpay shall be computed on a quarterly basis in the manner established by

[3] The fact that Respondent, in the General Counsel's view, would have had a basis for attacking Pickral's credibility as a disgruntled discharged supervisor had it gone ahead and fired him on the spot does not outweigh the obvious desirability of Respondent's first securing Pickral's cooperation in its defense against the complaint.

[4] The facts found herein are based upon the entire record, from my observation of the witnesses and their demeanor in the witness chair, and upon substantial reliable evidence, "considered along with the consistency and inherent probability of testimony" (*Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474, 496 (1951)).

the Board in *F. W. Woolworth Company*, 90 NLRB 289, 291–294 (1950), and with interest thereon computed in the manner and amount prescribed in *Florida Steel Corporation*, 231 NLRB 651 (1977).[5] It shall further be recommended that Respondent offer James Keatts employment to the position, or its substantial equivalent, in which he would have been employed but for Respondent's discriminatory action towards him, without prejudice to any seniority or other rights or privileges he would have acquired, and make him whole under the cited standards of computation for any loss of earnings he may have suffered as a result of the discrimination against him from the date James Keatts was refused employment (May 5, 1980) to the date of an offer of such employment.

Because of the character of the unfair labor practices herein found, the recommended Order will provide that Respondent cease and desist from in any other manner interfering with, restraining, and coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[6]

The Respondent, H. B. Zachry Company, Roxboro, North Carolina, its officers, agents, representatives, successors, and assigns, shall:

1. Cease and desist from:

(a) Engaging in surveillance of union activities and creating the impression of same.

(b) Threatening employees with discharge for engaging in union activities.

(c) More strictly enforcing work rules in retaliation for employees' union activities.

(d) Informing employees that an employee was discharged for union activities.

(e) Informing employees that an employee was not rehired because of union activities.

(f) Informing employees that union supporters were being laid off before employees who did not support the Union.

(g) Discharging and refusing to rehire employees because of their membership in or activity on behalf of the Union, or any other labor organization.

(h) Refusing to employ any prospective employee because such employee is related to employees who support or form the Union.

(i) In any other manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 7 of the National Labor Relations Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer Barry Edwards, Frank Keatts, John Scott, James Fuller, Victor Welch, Lester Hodge, Barry Robertson, Garland Keatts, John Bauer, and Mark Keatts immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings they may have suffered by reason of the discrimination against them in the manner set forth in the section of this Decision entitled "The Remedy."

(b) Offer James Keatts employment to the position, or its substantial equivalent, in which he would have been employed on May 5, 1980, without prejudice to any seniority or other rights or privileges he would have acquired and make him whole for any loss of earnings he may have suffered by reason of the discrimination against him under the same standards of computation.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due.

(d) Post at its Roxboro, North Carolina, Mayo Project copies of the attached notice marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 11, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 11, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS HEREBY FURTHER ORDERED that any allegations in the complaint not herein specifically found to constitute violations of the Act be, and they hereby are, dismissed.

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[5] See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962).

[6] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[7] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."